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In the Supreme Court of the United States

OCTOBER TERM, 1979

COMMITTEE FOR AUTO RESPONSIBILITY, ET AL.,
PETITIONERS

v.

R. G. FREEMAN III, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, AND GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

DIRK D. SNEL
ANNE S. ALMY
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 603 F. 2d 992. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1979 (Pet. App. 1a). A petition for rehearing was denied on August 22, 1979 (Pet. App. 24a). The petition for a writ of certiorari was filed on November 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent General Services Administration should have prepared an environmental impact statement in connection with its use of the Great Plaza parking lot in Washington, D.C., or in connection with an alleged national or regional parking plan for federal employees.

STATEMENT

The Great Plaza is a large, open-air parking facility located south of Pennsylvania Avenue between 13th and 14th Streets, N.W., in an area known as the Federal Triangle in downtown Washington, D.C. The Plaza is owned by the United States and managed by respondent General Services Administration. For the past 40 years, GSA or its predecessor agencies have leased the Plaza to private parking management firms for four-year terms. In May 1976, the agency leased the Great Plaza to Parking Management, Inc. (PMI) for the four years ending in May 1980 (Pet. App. 4a-5a).

Under the terms of the lease, 1,325 of the approximately 1,800 parking spaces at Great Plaza are reserved for federal employee parking during the work week (Pet. App. 5a, 14a). At the time this suit was filed, the federal employees who held parking permits paid PMI a monthly fee that covered the company's cost of operations.[1] PMI rents the remaining spaces at hourly or daily rates to the general public.

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[1]In 1976, this monthly fee was $11.25. In addition, each employing agency paid GSA $28.50 a month per space, a figure that represented the imputed value of the parking space (Pet. App. 19a n.51, 21a n.56). In August 1979, the Director of the Office of Management and Budget announced a change in the fee structure and stated that new GSA regulations would be forthcoming. OMB Circular A-118, 44 Fed. Reg. 48638 (1979). Under the new GSA parking regulations, 44 Fed. Reg. 53161 (1979), parking rates for federal employees will rise to full commercial rates over a two-year period. Preference will be given to carpools. GSA reports that parking charges to employees for spaces in the Great Plaza Lot are currently $25.00 per month. This charge will rise to a full commercial rate for each space on October 1, 1981. See 44 Fed. Reg. 53163 (1979).

Since 1972, all of the federal employee parking spaces at the Great Plaza have been allocated to carpools (Pet. App. 5a). Parking spaces are reassigned every six to nine months among employees working at buildings in the Federal Triangle area. Priority is given to those carpools with the largest number of riders.

In April 1976, GSA prepared an environmental analysis of the proposal to offer the Great Plaza for a four-year lease to a private parking management firm chosen through competitive building. The analysis concluded that the lease would not be a major federal action significantly affecting the quality of the environment and that therefore an environmental impact statement (EIS) did not have to be prepared. GSA reached this conclusion because the proposed lease would simply continue the existing use of the facility and would have no new effect on the environment. The analysis also observed that failure to continue the existing use might have an adverse effect on the environment because alternative parking facilities that might be used by displaced federal employees would not impose carpool requirements (Pet. App. 14a-15a & nn. 35, 37).

In November 1976, when federal employee parking spaces at the Great Plaza were reallocated, petitioners filed this action to enjoin GSA from assigning parking spaces, from allowing assignments of spaces to become effective, or from using the Great Plaza for parking, unless the agency first prepared an acceptable EIS. In addition, the complaint sought a declaratory judgment

that GSA should file a comprehensive EIS on parking programs for federal employees in the metropolitan Washington, D.C. area and in the nation as a whole.[2]

Petitioners moved for a preliminary injunction, and the district court consolidated the hearing on the motion with that on the merits, in accordance with Fed. R. Civ. P. 65(a)(2). Following the hearing, the district court dismissed the action (Pet. App. C). The court reasoned that PMI was an indispensable party and that petitioners' failure to join the company as a defendant justified dismissal. The court further ruled that the reassignment of federal employee parking spaces at Great Plaza was not a federal action that required preparation of an EIS (Pet. App. 12a-13a n.30).

The court of appeals affirmed (Pet. App. 1a-23). The court stated that GSA acted reasonably in determining that the Great Plaza lease was not a major federal action requiring an EIS (Pet. App. 17a). The court also approved GSA's general policy decision "to consider jointly the environmental consequences of a federal project and its adjacent parking facility" when the project itself involves a major federal action (Pet. App. 17a & n.44). Finally, the court held that, because the Great Plaza lease entailed no proposed policy change and no change in the use of the federal facility, GSA did not violate the National Environmental Policy Act by failing to prepare an EIS (Pet. App. 18a, 23a).

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[2]The complaint also alleged that GSA's method of setting parking charges violated the Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 219, 40 U.S.C. 490(j). The district court held the GSA practice complied with the statute (Pet. App. 13a n.30). The court of appeals held that petitioners had no standing to raise the issue (Pet. App. 9a-10a), but that in any event the district court's ruling was correct on the merits (Pet. App. 21a-22a). Petitioners do not seek review on this issue.

ARGUMENT

The decision of the court of appeals is correct and does not warrant review by this Court.

1. Petitioners first assert (Pet. 10-11) that GSA should have prepared an EIS in connection with "its nationwide parking program" and that the agency's failure to do so is contrary to this Court's decision in *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976). This argument is insubstantial, because, as the court of appeals held (Pet. App. 15a n. 37), "[t]he record * * * does not support [petitioners'] claim that GSA has a national or areawide parking plan, and that is a matter beyond the range of judicial notice. Such a plan would be a necessary predicate for NEPA's requirement of an EIS. * * * Moreover, even if a national or areawide parking program did exist, [petitioners] have failed to show federal 'action' taken with respect to that program."

Far from being inconsistent with *Sierra Club*, the court of appeals' ruling is a direct application of that decision. This Court held in *Sierra Club* that, in the absence of any proposal for a regional coal-leasing plan, the Department of the Interior was not obligated to prepare a regional EIS dealing with possible coal-leasing activities in a four-state area. Here, petitioners did not demonstrate in the district court, and they do not proffer any evidence in this Court, that GSA has a nationwide or regional parking plan or that the agency's continued use of such a plan involves any federal "action." Under these circumstances, *Sierra Club* establishes that no nationwide or regional EIS is necessary.

2. Petitioners further contend (Pet. 12-15) that, at a minimum, GSA should have prepared an EIS in connection with the 1976 lease of the Great Plaza parking lot. They suggest several reasons why this Court

should review the rejection of that argument by the courts below, but each of petitioners' asserted justifications for further review is flawed.

a. Petitioners maintain (Pet. 12-13) that there is a conflict among the circuits regarding the proper standard of judicial review to be applied to an agency determination that a particular agency action is not a major federal action significantly affecting the quality of the environment and that an EIS therefore is not necessary. Petitioners observe that, in cases decided before this Court's ruling in *Kleppe* v. *Sierra Club*, *supra*, some courts of appeals said that a "reasonableness" standard should be applied on judicial review of such determinations and others indicated that a reviewing court should ask only whether the agency's determination concerning the need for an EIS was arbitrary or an abuse of discretion. Compare, *e.g.*, *City of Davis* v. *Coleman*, 521 F. 2d 661, 673 (9th Cir. 1975); and *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 465 (5th Cir. 1973) ("reasonableness"), with *Hanly* v. *Kleindienst*, 471 F. 2d 823, 828-830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) ("arbitrary and capricious").

Whatever conflict may have existed before *Sierra Club* was resolved by this Court in that case. The Court held that the "arbitrary, capricious, or abuse of discretion" test should govern. In the Court's words (427 U.S. at 412) (citations omitted):

> Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree. The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant

> factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.

Moreover, it is not at all certain that any practical significance ever attached to the different verbal formulas applied by the courts of appeals. See *Peshlakai* v. *Duncan*, 476 F. Supp. 1247, 1252 & n.12 (D.D.C. 1979). Indeed, in *Maryland-National Capital Park and Planning Commission* v. *U.S. Postal Service*, 487 F. 2d 1029 (D.C. Cir. 1973), the court of appeals apparently applied both tests without identifying any clear practical distinction between them. Here, too, although the court of appeals stated that the correct standard of review was whether "the agency has abused its discretion or has acted arbitrarily" (Pet. App. 16a), the court actually held that GSA did not act "unreasonably" in determining that the Great Plaza lease was not a major federal action significantly affecting the environment (Pet. App. 17a). Accordingly, the existence of a real conflict, even before *Sierra Club*, is not clear, and in any event the court of appeals' opinion in the present case establishes that petitioners are not entitled to relief even under the "reasonableness" standard they advocate.

b. Petitioners also argue (Pet. 13-15) that the present case creates a conflict among the circuits with respect to the need for an EIS in connection with programs initiated before NEPA's enactment. In support of this contention, petitioners cite two cases, both of which involved construction projects that were partially

completed when NEPA became law. *Jones* v. *Lynn*, 477 F. 2d 885 (1st Cir. 1973); *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164 (6th Cir. 1972). The present case, by contrast, concerns the continuing operation of a federal facility, not the completion of a partially finished construction or development project. Federal agencies have enjoyed considerable discretion in applying NEPA in the context of continuing operation and maintenance programs. See, *e.g.*, *Grand Canyon Dorries, Inc.* v. *Walker*, 500 F. 2d 588, 589 (10th Cir. 1974). This discretion is reflected in the Council on Environmental Quality's recent regulations governing the implementation of NEPA (see 40 C.F.R. 1501.4(a), 1507.3, 1508.4, 1508.18) and was properly exercised in connection with the Great Plaza lease challenged by petitioners. Unlike the completion of the projects involved in *Jones* and *EDF*, the continuation of federal employee parking in the Great Plaza lot entailed no new environmental effects and therefore did not require the filing of an EIS. As the court of appeals declared (Pet. App. 17a-18a), "[t]he duty to prepare an EIS normally is triggered when there is a proposal to change the status quo. GSA has clearly shown * * * that current leasing of the Great Plaza area to a parking management firm does not alter the status quo ante."

c. Finally, petitioners contend (Pet. 11-12) that GSA's decision not to prepare an EIS in connection with the Great Plaza lease was defective because GSA reached the decision without consulting the Department of Transportation and the Environmental Protection Agency. Petitioners insist that this failure to consult violated Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), as construed in *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406 n.15. Petitioners have misread both the statute and the relevant footnote in this Court's *Sierra Club* opinion.

Like the EIS requirement itself, the statutory requirement of consultation with other federal agencies before the preparation of an EIS is triggered by a proposal for a major federal action that will significantly affect the quality of the human environment.[3] Neither the statutory language nor the decision in *Sierra Club* suggests that each federal agency invariably must consult with other federal departments and agencies in determining whether a particular action requires an EIS. Even if such consultation might be salutary in some cases, GSA did not err here in deciding on its own that the parking lease was not a major federal action within the meaning of NEPA. The agency action involved no new environmental effects, and that fact was readily ascertainable without consulation with other governmental bodies.

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[3]Under the CEQ guidelines in effect at the time of the lease and the filing of the complaint in the present case, consultation with other agencies was not required as part of the process of identifying major federal actions. See 40 C.F.R. 1500.6 (1978). Under the recently promulgated CEQ regulations, which replaced the former guidelines, agencies are required to "involve environmental agencies" in such determinations only "to the extent practicable." 40 C.F.R. 1501.4(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

DIRK D. SNEL
ANNE S. ALMY
Attorneys

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